

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

The UNITED STATES of America)
 for the Use and Benefit of)
 Graybar Electric Company,)
 Inc., a New York Corporation,)
 and GRAYBAR ELECTRIC COMPANY,)
 INC., Individually,)
 Plaintiffs,)

NO. CV-05-0068-LRS

ORDER DENYING DEFENDANT
 ATLANTIC MUTUAL INSURANCE
 COMPANY'S MOTION FOR
 SUMMARY JUDGMENT

-vs-

OVERSTREET ELECTRIC CO., INC.,)
 a Florida Corporation and)
 ATLANTIC MUTUAL INSURANCE)
 COMPANY, a New York)
 Corporation,)
 Defendants.)

Before the Court is Defendant Atlantic Mutual Insurance Company's [Atlantic] Motion for Summary Judgment (Ct. Rec. 43-1), filed August 29, 2005. A hearing was held on September 29, 2005 in Yakima, Washington. Henry Hamilton appeared on behalf of Defendant Atlantic. Carl Kirsch appeared telephonically and C. Richard McQueen appeared in person on behalf Plaintiff Graybar Electric Company [Graybar]. James Yand appeared for Defendant Overstreet Electric Company [Overstreet].

Defendant Atlantic asserts Plaintiff's claim under the Miller Act is time-barred pursuant to 40 U.S.C. §3133(b)(4) because Plaintiff's March 18, 2005 delivery of Operations and Maintenance

1 manuals [O&M manuals] constituted a delivery of materials that was
2 merely corrective in nature.

3 Plaintiff, in its opposition, argued that the delivery of O&M
4 manuals on March 18, 2005 constituted a delivery of Miller Act
5 materials that triggered the running of the Act's one-year statute
6 of limitations. Plaintiff's complaint was filed on March 4, 2005.

7 The Court found at the hearing that genuine issues of material
8 fact existed as to the ultimate determination of the date upon
9 which the last materials were delivered by Plaintiff pursuant to
10 the original purchase order contract¹ requiring specific materials
11 to be supplied by Plaintiff. Whether the March 18, 2005 delivery
12 of O&M manuals was corrective in nature and whether the action was
13 timely commenced, are issues of fact that can only be resolved at
14 trial.²

15 The Court considered the undisputed fact that Plaintiff was
16 informed by fax directive on March 21, 2005 from Defendant
17 Overstreet's project manager that "all new sets" were required by
18 the U.S. Army Corps of Engineers [Corps] and that "the Corps won't
19 accept updates." The Court further considered the undisputed

21 ¹On July 16, 2002, Defendant Overstreet and Plaintiff Graybar
22 entered into an agreement titled Purchase Order No. 402-241860
23 [P.O.] for the provision of certain materials and equipment for
24 installation of a station service transformer for the Chief Joseph
25 Dam for United States contract No. DACW67-020C-0012 [Government
Contract]. The P.O. was for the sum of \$370,800. Specification
Section 01701 of the Government Contract was the provision
requiring the provision of O&M manuals submitted by Overstreet to
the Corps.

26 ²As an aside, the Court notes that at least one circuit, the
27 Fifth Circuit, has not expressly adopted the general rule which
28 provides that remedial or corrective work does not extend the one-
year limitations period. See *United States of America for the
Use and Benefit of T.L. Wallace Construction, Inc. v. Fireman's
Fund Ins. Co.*, 790 F.Supp. 680,684 (S.D. Miss. 1992).

1 evidence that indicated Plaintiff was never relieved of its
2 contractual performance obligations to Defendant Overstreet,
3 including provision of the O&M manuals for the Trench air core dry
4 reactor Plaintiff Graybar supplied to Overstreet.³

5 The Court having considered the oral and written argument of
6 counsel, enters this Order to supplement and memorialize the oral
7 rulings of the Court. Accordingly,

8 **IT IS ORDERED** that:

9 1. Defendant Atlantic's Motion for Summary Judgment, Ct. Rec.
10 43-1, filed August 29, 2005 is **DENIED**.

11 2. Plaintiff's *Sua Sponte* Motion for Summary Judgment, raised
12 in its opposition briefing, is **DENIED** based on the court's ruling
13 above.

14 The District Court Executive is directed to file this Order and
15 provide copies to counsel.

16 **DATED** this 3rd day of October, 2005

17 *s/Lonny R. Suko*

18 _____
19 LONNY R. SUKO
20 UNITED STATES DISTRICT JUDGE
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28 ³The court notes that the Trench core dry reactor is
currently in the Corps' possession and Plaintiff is presently owed
\$313,036.37 for supplying the reactor to Overstreet on credit.